

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

2013 DEC 11 PM 4:30

LEEANN FLYNN HALL
CLERK OF COURT

IN RE MOTION OF PROPUBLICA, INC.
FOR THE RELEASE OF COURT RECORDS

) Docket No.: Misc. 13-09
)
)

**THE UNITED STATES' OPPOSITION TO THE
MOTION OF PROPUBLICA, INC.
FOR THE RELEASE OF COURT RECORDS**

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ProPublica, Inc. (“ProPublica”) seeks the publication of “a certain Foreign Intelligence Surveillance Court (‘FISC’) opinion or opinions that appear to underlie the government’s collection of telephone metadata. The specific opinion or opinions sought are those referenced on, but redacted from, pages 8, 9, and 19-20 of *In re Application of the FBI for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 13-109 (FISA Ct. Aug. 29, 2013) (‘BR 13-109’).” Mot. at 1. ProPublica’s motion should be dismissed because the relevant opinion has been subjected to classification review and the unclassified portions released, and there is no basis for the Court to order a new classification review.

ARGUMENT

I. ProPublica’s Motion Should Be Dismissed Because a Declassified Version of the Requested Opinion Has Already Been Released.

ProPublica’s motion should be dismissed because the Government has already released a declassified version of the opinion that is referenced on, but redacted from, pages 8, 9, and 19-20 of *In re Application of the FBI for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 13-109, Order (Foreign Intel. Surv. Ct. Aug. 29, 2013). After a classification review conducted by the Executive Branch consistent with Executive Order 13,526 (Dec. 29, 2009), all unclassified portions of this opinion were released by the Executive Branch. This opinion is:

The Court’s Opinion (J. Kollar-Kotelly) granting the Government’s application seeking the collection of bulk electronic communications metadata pursuant to Section 402 of the Foreign Intelligence Surveillance Act, the Pen Register and Trap and Trace provision. (Released by the Executive Branch on November 18, 2013), *available at* <http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf>.

Because the Government has already conducted a thorough classification review of this opinion, there is no basis to require the Government to review it again.

II. The Court Should Not Order the Government to Conduct a New Classification Review of the Opinion.

A. *ProPublica* does not have standing to seek declassification.

Although this Court has inherent authority to require a classification review of its own opinions as a matter of discretion, and can order such a review *sua sponte*, that authority should be exercised in a manner that is consistent with FISA and this Court's rules. FISA does not provide third parties with the right to seek disclosure of classified records of this Court. *In re Mot. for Release of Ct. Records*, 526 F. Supp. 2d 484, 491 (Foreign Intel. Surv. Ct. 2007). Under United States Foreign Intelligence Surveillance Court ("FISC") Rule of Procedure 62(a) ("FISC Rule"), only a "party" may move the Court for publication of an opinion.¹ This Court recently concluded that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication." *In re Orders of this Ct. Interpreting Section 215 of the Patriot Act*, Docket No. Misc. 13-02, Opinion and Order, at 11 (Foreign Intel. Surv. Ct. Sept. 13, 2013), *available at* <http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-130813.pdf>. *ProPublica* is not a

¹ **Rule 62. Release of Court Records**

(a) Publication of Opinions. The judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

FISC Rule of Procedure 62(a).

party to the proceedings that generated the relevant opinion and, therefore, does not have standing to move for publication of the opinion.

FISC Rule 62(a)'s limitation on who can move for publication of an order, opinion, or other decision is in accord with the fact that a comprehensive statutory regime—the Freedom of Information Act (“FOIA”)—governs requests for documents classified by and in the possession of the Executive Branch. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32. As this Court has recognized, although this Court has supervisory power over its own records and could conduct a review “under the same standards as a district court would in FOIA litigation,” “there would be no point in this Court’s merely duplicating the judicial review that the ACLU, and anyone else, can obtain by submitting a FOIA request to the Department of Justice for these same records.” *Id.* at 496 n.32.

The Court should insist that ProPublica respect, and not through its motion attempt to circumvent, the FOIA process enacted by Congress. Accordingly, the Government submits that the Court should not exercise its inherent discretion to determine whether to order a declassification review in this case. FOIA carefully prescribes a process whereby parties must first seek administrative review of FOIA requests before bringing litigation, and FOIA includes additional exemptions beyond the classification exemptions that would overlap with a declassification review ordered by the FISC. Such duplicative processes therefore raise administrative concerns, and the FISC should resist invitations to serve as an alternative forum for FISC-related matters that can and should be resolved through the FOIA process established by Congress.

B. This Court traditionally does not involve itself with the Executive Branch's classification decisions.

ProPublica seeks an order giving it full access to the opinion or, in the alternative, requiring the Government to justify any redactions to the Court as necessary to prevent a substantial probability of harm to a compelling interest. ProPublica invokes the First Amendment, but the First Amendment does not justify judicial (or ProPublica's) involvement in Executive Branch classification decisions.

Putting aside the fact that this Court has repeatedly rejected arguments that litigants such as ProPublica have a First Amendment right to access classified FISC records,² the Court does not interfere with the Government's classification process and classification decisions. Under FISC Rule 62(a), the Court is empowered only to "direct the Executive Branch to review the [opinion] and redact it as necessary to ensure that properly classified information is appropriately protected." This limitation on the Court's discretion is consistent with the requirement that, "[i]n all matters, the Court and its staff shall comply with the security measures established pursuant to [Congressional mandate], as well as Executive Order 13526." FISC Rule 3; *see also* FISC Rule 62(b) (mandating that a release of FISC records must be conducted "in conformance with the security measures referenced in Rule 3"). Executive Order 13,526 "prescribes a uniform

² *See In re Mot. for Release of Ct. Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007); *In re Mot. for Release of Ct. Records*, Docket No. Misc. 07-01, Memorandum Opinion (Foreign Intel. Surv. Ct. Feb. 8, 2008), *available at* <http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-us-opposition-130705.pdf> (Appendix A to *In re Orders Issued by This Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, The United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records (Foreign Intel. Surv. Ct. July 5, 2013)). Additionally, this Court recently chose not to "reach[] the merits of the [ACLU's] asserted right of public access under the First Amendment." *See In re Orders of this Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, Opinion and Order, at 17 (Foreign Intel. Surv. Ct. Sept. 13, 2013).

system for classifying, safeguarding, and declassifying national security information,” and under that system only certain designated Executive Branch officials can classify or declassify national security information. *See* Exec. Order 13,526.

Consistent with the Court’s Rules of Procedure, the Court’s decisions also make clear that the Court does not involve itself with the Executive Branch’s declassification decisions. Indeed, “if the FISC were to assume the role of independently making declassification and release decisions . . . there would be a real risk of harm to national security interests and ultimately to the FISA process itself.” *In re Release*, 526 F. Supp. 2d at 491. “FISC judges do not make classification decisions and are not intended to become national security experts.” *Id.* at 495 n.31 (citing H.R. Rep. No. 95-1283, pt. 1, at 25-26 (1978)). And, while FISC judges may have “more expertise in national security matters than a typical district court judge, that expertise [does] not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security.” *Id.* Thus, this Court has recognized that “there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions.” *Id.* at 491.³ This Court recently reiterated that “[i]t is fundamentally the Executive Branch’s responsibility to safeguard sensitive national security information.” *In re Mot. for Consent to Disclosure of Ct. Records*, Docket No. Misc. 13-01, Opinion and Order, at 6 (Foreign Intel. Surv. Ct. June 12, 2013) (citing *Department of Navy v. Egan*, 484 U.S. 518, 527-29 (1988)), available at www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf. Thus, this Court should deny ProPublica’s First Amendment classification review request.

³ This is not to say that Executive Branch classifications are never judicially reviewable. The proper means to obtain such review is through a FOIA request and subsequent action in district court. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32.

For these reasons, the Court should deny ProPublica's request for a new classification review of the relevant opinion. There is no need for this Court to order a new classification review of the relevant opinion because the Government recently conducted a thorough classification review of the opinion and made "public as much information as possible about certain sensitive intelligence collection programs undertaken under the authority of the Foreign Intelligence Surveillance Act (FISA) while being mindful of the need to protect national security."⁴ Release of this document reflected the Executive Branch's continued commitment to making information about intelligence collection publicly available when appropriate and consistent with the national security of the United States.

CONCLUSION

For the reasons stated above, ProPublica's Motion should be denied.

⁴ *DNI Clapper Declassifies Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (FISA)*, available at <http://icontherecord.tumblr.com/post/60867560465/dni-clapper-declassifies-intelligence-community>.

December 11, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Opposition to the Motion of ProPublica, Inc. for the Release of Court Records was served by the Government via Federal Express overnight delivery on this 11th day of December, 2013, addressed to:

David Greene
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/s/ Nicholas J. Patterson
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